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No. 80-440

IN THE SUPREME COURT OF THE UNITED STATES

GLENN L. SIKORA,
Petitioner,

-VS-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER THE SURREPTITIOUS OBTAINING OF STATEMENTS AND OTHER EVIDENCE FROM THE PETITIONER, WHO WAS "AS GOOD AS INDICTED," BUT WHOSE INDICTMENT HAD BEEN HELD IN ABEYANCE SO THAT THE GOVERNMENT COULD APPROACH HIM MORE DISCREETLY, VIOLATE THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

II. WHETHER STATEMENTS REGARDING PETITIONER'S INVOLVEMENT IN NARCOTICS ACTIVITIES SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE BECAUSE THEY WERE MADE IN RESPONSE TO A GOVERNMENT AGENT'S INQUIRY OF PETITIONER, SPECIFICALLY AUTHORIZED BY A UNITED STATES ATTORNEY, AS TO WHETHER PETITIONER WOULD, BY COOPERATION WITH THE GOVERNMENT, SEEK TO AVOID IMPENDING CHARGES.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

Glenn L. Sikora, by and through his attorney, N. C. Deday LaRene petitions herein for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit affirming his conviction for violation of 21 USC § 841(a)(1) filed July 21, 1980.

OPINION BELOW

The unpublished Order of the Sixth Circuit Court of Appeals filed July 21, 1980, affirming Petitioner's conviction, is reprinted herein as Appendix A to this Petition together with the dissent therefrom, authored by Wiseman, J.

JURISDICTION

The Order appealed from was filed July 21, 1980. The jurisdiction of this Court is involved under 28 USC §1254(1).

STATUTE INVOLVED

The Statute under which Petitioner was convicted, 21 USC §841(a)(1) provides as follows:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —
>
> > (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

STATEMENT OF THE CASE

The petitioner, Glenn Sikora, was charged in a sixteen count Indictment with possession with intent to distribute and delivery of cocaine, in violation of 21 USC § 841(a)(1). After a non-jury trial before the Honorable Julian A. Cook, he was convicted of all counts, and subsequently sentenced to eight years custody, plus six years special parole. He appeals herein as of right.

The series of events which led to the petitioner's prosecution was initiated in April of 1977 when Joseph Rassey, a Special Agent of the DEA working in an undercover capacity, arranged to purchase cocaine from an individual named David Kondrat. Investigation led the agents from Kondrat to his source, one Edward Ajoian, and a number of purchases of cocaine were made from Ajoian between April and August of 1977.

Subsequent to Ajoian's arrest on November 7, 1977, for the previous sales of cocaine, he agreed to cooperate with the Government, in exchange for leniency in charging. The focus, or target of his cooperation, was the defendant-appellant.

Previous surveillance of Ajoian, while he was the target of the investigation, had placed him in the vicinity of an apartment occupied by the Petitioner, Glenn Sikora. After his arrest, Ajoian apparently indicated that he had been securing the cocaine which he delivered to Special Agent Rassey from Sikora, and, at any rate, agreed to make "controlled purchases" of cocaine from the petitioner—a long time friend of his.

During May of 1978, the defendant was on probation to the Federal court in connection with a prior conviction. Believing that there was ample evidence to indict the defendant and believing that his precarious legal position would likely move him to cooperate with the Government in further investigations, Special Agent Rassey, after discussing the matter with an Assistant United States Attorney

and the defendant's probation officer, made arrangements with the probation officer to notify him when Sikora came in for his appointment. On May 24, 1978, the petitioner reported as required to his probation officer, who contacted Special Agent Rassey and suggested that he could see petitioner if he wanted to.

Rassey went to the probation office, introduced himself to the petitioner, told him that he was under investigation by the DEA, that "we hade enough evidence to indict and convict him," that an indictment would likely be forthcoming in the near future, and that it would be "in his best interest" to cooperate with the DEA, since "considering the fact he was on probation and that if he was indicted and convicted, the chance of him receiving a severe sentence was very possible." During this conversation, which lasted approximately 20 to 25 minutes, Rassey inquired whether Sikora would obtain counsel with whom he could confer about the DEA's proposition (after learning that the writer of this petition had represented Sikora in connection with his prior conviction, Rassey advised the defendant that it would be "safe" to discuss the matter with the writer, and told the defendant to take some time to think about his decision—"I told him to take about a week to think about it and let me know what he wanted to do."

According to Rassey's testimony, he then went down to his office on the third floor of the same building in which the probation department is located; approximately half an hour to 45 minutes later the probation officer called him and indicated that the defendant "wanted to come down and talk to me right away, that he wanted to ask me a few questions about a few things." Rassey said that it would be alright for the defendant to come see him. "A little shook up about what [Rassey] had said upstairs," Sikora then appeared at the DEA office, asking specifically what sort of cooperation was being requested. Rassey told the defendant that he "was interested in people dealing pound quantities" of cocaine, to which the defendant replied that he had two or three people who offered him pounds, and that he knew

whom the DEA wanted. Prior to trial, defendant filed a motion to suppress the contents of this conversation, which was denied.

After talking to Sikora, Rassey called Edward Ajoian "to let him know what had happened so he would be aware of the situation," and "asked him if anything happened or if Mr. Sikora said anything for him to let me know." Although Rassey may not have specifically asked Ajoian to contact Sikora, he knew at that time that Ajoian and Sikora had contact with each other on a daily basis, and had for "a number of years or months." Although Ajoian disclaimed a recollection of whether he called Sikora or Sikora called him, nonetheless within a short time after Rassey had approached Sikora, Sikora told Ajoian about the contact, and that he was "in trouble," and wanted to get rid of "his scales and stuff"—the paraphernalia of dealing. Ajoian went to Sikora's house, got the scales and other paraphernalia and then called Special Agent Rassey and told him he had the scales. The scales, which were found to have the defendant's fingerprint on them, were subsequently introduced at the defendant's trial. Although Sikora had only asked Ajoian to get rid of the scales, because he did not want them around, Ajoian decided to get money for them. What he did was secure $150.00 from the DEA (which he kept to cancel a debt allegedly owing from Sikora to him), and, at the suggestion of the DEA, went back to the defendant's house wearing a body transmitter to report on the disposal of the scales.

The conversation which was recorded through the instrumentality of the body transmitter was long and extremely incriminating to the defendant. In it the participants reminisce about the "good old days" of drug dealing and making money, the defendant offers advice as to how best to deal in cocaine, and volunteers that he will miss the life, now that he has "retired." Relying principally upon the logic of *Massiah* v. *United States*, 377 US 201 (1964), and the proposition that he was essentially in the position of a defendant at the time that Rassey approached him on May

24, 1978, the petitioner moved to suppress both the scales and the contents of the conversations had with Ajoian regarding the scales. After hearing, that motion, too, was denied.

Petitioner waived jury trial, was convicted of all counts of the indictment, and appealed as of right to the Sixth Circuit Court of Appeals. On July 21, 1980 a panel of that court affirmed petitioner's conviction, over a lengthy dissent by one judge. (The unpublished order and opinion of the Sixth Circuit is set forth as Appendix A herein).

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS DECISION WAS IN CONFLICT WITH PRONOUNCEMENTS BY THIS COURT AND WITH DECISIONS OF OTHER CIRCUITS AND INCORRECTLY APPLIED THE TEST OF WHEN THE ACCUSED'S SIXTH AMENDMENT RIGHT TO COUNSEL ATTACHES, THEREBY ADMITTING EVIDENCE SURREPTITIOUSLY OBTAINED BY THE GOVERNMENT FROM THE DEFENDANT AT A CRITICAL STAGE OF THE PROSECUTION WHEN THE DEFENDANT WAS NOT REPRESENTED BY COUNSEL.

Nothing can be clearer than that, at the time that he was approached by Special Agent Rassey in the office of the Probation Department, the petitioner was "as good as" indicted. As Rassey himself put it, "the indictment was coming soon, but his decision about the cooperation may or may not have changed his situation"—if Sikora did nothing, he was going to be indicted; through cooperation he may or may not have been able to save himself from charges being brought: "He could have cooperated and it still might have been the decision of the United States Attorney to indict him."

Within days after the May 24 meeting, petitioners present counsel became involved in the discussions of whether or not Sikora might be able to avert indictment through

cooperation. And, as Rassey testified, as of the date of the monitored conversation between Sikora and Ajoian (June 14, 1978), those discussions were still taking place—petitioner's counsel had asked for the indictment to be put off for "a little more time," while the discussions continued, and the Government agreed to the delay.

Rassey knew that Sikora and Ajoian were, in his words, "closely associated"—that they talked to each other on a daily basis. Knowing that, directly after his conversation with Sikora he called Ajoian, anticipating that Sikora would go to Ajoian about Rassey's confrontation of him. He asked Ajoian "if anything happened or if Mr. Sikora said anything for him to let me know." At the time that Ajoian went to the petitioner's house with the body transmitter, it was Rassey's testimony that he instructed Ajoian only to hand over the money for the scales, not to "press" Sikora, and "to talk to him as you normally do, ask him how things were going." Nevertheless, Ajoian strongly and repeatedly not only endeavored to draw the petitioner into conversations about controlled substances, and dealing in controlled substances, but again and again asked, wheedled, even begged the petitioner to get him quantities of cocaine—which he refused to do.

Although it was Rassey's testimony that Ajoian told him that Sikora had originally called Ajoian regarding the scales, Ajoian testified that he did not remember whether it was he or the petitioner who initiated the conversation.

It is the position of the petitioner herein that the decision of this in *Massiah* v. *United States*, 377 US 201 (1964), should have been held to compel the suppression of both the physical evidence secured from the petitioner by Edward Ajoian, and subsequently turned over to the Government, and the contents of the conversations had between Ajoian and the petitioner.

In *Massiah*, the Court held that the Fifth and Sixth Amendments to the Constitutions were violated when the Government equipped one Colson—a co-defendant of

Massiah who had decided to cooperate with the Government—with a radio transmitter, and introduced testimony at Massiah's trial from agents who had overheard incriminating statements made by Massiah to Colson through the aid of the transmitting device. The Court held, in essence, that the defendant's own incriminating statements, secretly obtained by the deliberate conduct of Government agents after the defendant had been indicted, in the absence of counsel, could not be constitutionally used as evidence against him. It is true that *Massiah* is factually distinguishable from the case at bar inasmuch as an indictment had already been returned against Massiah, while, at the time of the events herein at issue, an indictment had not yet been returned against the appellant. However, it was and is the contention of the petitioner that the lack of formal indictment in the case at bar is of no decisional significance. This position was rejected by the majority of the Sixth Circuit panel, and that rejection seems not only wrong, but in conflict with the decisions of other circuits, as well as prouncements by this Court.

In *United States* v. *Brown*, 551 F2d 639, 643 (5th Cir. 1977) the Fifth Circuit Court of Appeals held that a statement obtained from the defendant prior to the initiation of a federal criminal prosecution, but while she was represented by counsel, and in the absence of counsel, was inadmissible as a violation of *Massiah* v. *United States*, notwithstanding the fact that the warnings prescribed by *Miranda* v. *Arizona*, 384 US 436 (1966) had been given to the defendant. The panel wrote:

> We find that the *Massiah* proscriptions apply even though Mary Brown was not indicted by the Federal Grand Jury until March 6, 1975. The right to consult with counsel attaches "when the process shifts from investigatory to accusatory . . ." *Escobedo* v. *Illinois*, 378 US 478, 492, 84 SCt 1758, 1766, 12 LEd 2d 977, 989. *See Clifton* v. *United States* 5 Cir. 1965, 341 F2d 649, 651. "*Escobedo* and *Massiah* represent a broad endorsement by the Supreme Court of the

> right to have counsel present during an interrogation once the investigation has begun to focus on a particular suspect." *Clifton* v. *United States, supra,* 341 F2d at 652. Here the FBI interrogation took place on August 14, 1974, several days after her arrest, while Mary Brown was on her way to a preliminary hearing on state charges arising out of the identical circumstances on which the Federal Indictment was based. The investigation concerning the stolen Sears Merchandise Certificates was focused directly on Mary Brown. Agent Parga was not merely trying to ascertain whether or not there was probable cause to believe a crime had been committed. *See Clifton* v. *United States, supra.* She already knew that a crime had been committed. The process was no longer investigatory in nature; it had shifted from investigatory to accusatory. Mary Brown was by now the focal point of the FBI's probe, precisely the juncture where legal advice is crucial to an individual. [footnote omitted] 551 F2d *supra* at 643.

The "arrest" referred to in the quoted passage refers to the defendant's arrest on state charges, not an arrest by the FBI.

It is true that the panel decision in *Brown* was reversed by the court sitting *en banc,* 569 F2d 236 (5th Cir. 1978). However, even that reversal is persuasive of the petitioner's osition herein, and conflicts with the Sixth Circuit majority's decision, since the *en banc* court held that the distinguishing point between the defendant Brown's situation and that faced by Winston Massiah was *not* the presence or absence of an indictment, but, rather, the fact that in *Brown,* the actions of the police were not surreptitious (as were the actions of the agents in the case at bar). As the majority of the *en banc* court wrote:

> The defendant relies on *Massiah* v. *United States,* 377 US 201, 84 SCt 1119, 12 LEd 2d 246 (1964) for the proposition that once the criminal process shifts from investigatory to accusatory, she cannot be in-

> terrogated by the Government unless her attorney is notified. She states *Massiah* too broady. *Massiah* arose because of "secret interrogations" accomplished surreptitiously and has no relationship to the facts present here. This interrogation took place in a public corridor with full identification of the individuals and subject matter discussed. 569 F2d *supra* at 238.

As the Fifth Circuit notes, it is the surreptitiousness of the Government conduct which offends the protections recognized and advanced by *Massiah*, and it is not the simple litmus of whether formal charges are pending or not which controls.

Indeed, it has long been held that where Fifth Amendment rights are at stake, at least in the context of a grand jury, that "a person who is virtually in the position of a defendant must be accorded the same rights as a defendant." *United States* v. *Luxenberg*, 374 F2d 241, 246 (6th Cir. 1967), citing *Stanley* v. *United States*, 245 F2d 427 (6th Cir. 1957). At least in that context, the question is not one of whether a formal charge has been returned, but, rather whether the subject is "virtually" a defendant or not. *United States* v. *Fromin*, 540 F2d 846, 849 (6th Cir. 1976).

Indeed, at least four justices of this Court have squarely held that the presence or absence of a formal charge is not the determining factor as to whether *Massiah's* protections apply—rather, the litmus to be applied is the *Escobedo* standard of whether the investigation has shifted from "general inquiry" to "focus" on the subject.

In *Miller* v. *California*, 392 US 616 (1968), the petitioner had been arrested for murder, but was held without formal charge, when the state authorities placed an undercover operative in her jail cell, with instructions to report any statements made by her. The defendant did in fact make incriminating statements, to which the undercover operative testified at her trial. After the defendant's conviction was affirmed by the California Supreme Court, on the basis that any objection to the undercover operative's testimony had been waived by failure to make a specific objection, this court granted certiorari, but subsequently dismissed the writ

as improvidently granted, apparently upon the basis of a waiver analysis. Four justices dissented, in an opinion authored by Mr. Justice Marshall, which specifically rejected the claim that *Massiah* did not apply because formal charges had not been lodged against the defendant at the time the undercover operative was placed in her cell. Justice Marshall wrote that the language of *Escobedo* to the effect that the right to counsel there violated accrued at the time that "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect," *Escobedo* v. *Illinois*, 378 US 478, 490 (1964) "applies here." 392 US *supra* at 623.

Mr. Justice Marshall referred to the decision of the Fifth Circuit Court of Appeals in *Clifton* v. *United States*, 341 F2d 649 (5th Cir. 1965) as standing for the proposition that *Massiah* bars the admission of statements obtained "at some preindictment point, at least when the accusatory stage has been reached and the police have clearly focused upon the subject." *Ibid.* (footnote omitted). Indeed, *Clifton* does so hold, and equates (as this Court should equate) the protection of *Massiah* with that of *Escobedo*.

Similarly, in *United States* v. *Vallieres*, 443 F Supp 186, 192 (D Conn 1977) the District Court held that *Massiah's* proscriptions applied in a situation in which formal charges against the defendant had not yet been commenced in court.

The Sixth Amendment right to counsel, which is certainly one of the several cornerstones of the *Massiah* rule, may attach at different points in time for different purposes. Thus, *Escobedo* makes clear that the pendency of formal charges is not necessary for the panaoply of Fifth and Sixth Amendment rights there (or here) under consideration to come into play. Cases such as *Kirby* v. *Illinois*, 406 US 682 (1972), holding that the right to counsel in the context of extrajudicial identification procedures does not apply until the initiation of formal legal proceedings, is simply inapposite to the case at bar, since the fundamental premise of *Kirby* and its progeny is that neither Fourth nor

Fifth Amendment protections were involved. In a case such as the one at bar, where not only Sixth Amendment protections are implicated, but also those of the Fourth and Fifth Amendments, the proper standard is that of *Escobedo*, whether "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect." 378 US *supra* at 490-491. As the court wrote in *Escobedo:*

> It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal Indictment. US *supra* at 484.

In the case at bar, the process had clearly shifted "from investigatory to accusatory." As of June 14, 1978, Glen Sikora was surely "virtually in the position of a defendant." His right, under the Sixth Amendment, to the assistance of counsel to consult with and assist him in the protection of his Fifth Amendment privilege against self-incrimination, was as surely and clearly violated as was that of Winston Massiah, who had already been indicted, and as that of Danny Escobedo, who had not yet been indicted, but who was being held in police custody while his lawyer was kept from him. Indeed, the Governmental conduct in the case at bar is more pernicious than that involved in *Escobedo,* since at least in *Escobedo,* the defendant was aware of the identity and purpose of his interrogators, while in the case at bar, the fact that Glen Sikora was speaking to a Government informant, and through him to the Government, was kept secret from him. The investigation in the case at bar had not only shifted to an accusatory or "focused" phase, it had reached fruition; Agent Rassey testified that the indictment was being held up pending his discussions with the defendant, and that no harm could come from the delay "because there was no more evidence that could be obtained and would be obtained."

Again, the observations of the *Escobedo* court are particularly in point: "No meaningful distinction can be drawn between interrogation of an accused before and after formal indictment." 378 US *supra* at 486. Rather, the question should always be whether the circumstances of the "interrogation" are such as to impel constitutional protections. In *Escobedo,* the determining factor was the custody of the defendant and the circumstances surrounding his questioning. In the case at bar, it is the surreptitious nature of the contact—the keystone of *Massiah*—which compels suppression.

The Court should not long pause over any suggestion that the statements and physical evidence secured from the defendant are not such as would fall within the *Massiah* guidelines. *Massiah* does not require any particular degree of affirmative conduct on the part of the Government or its agents, but, rather, no more than a course of action which is designed or reasonably well adapted to secure such evidence. Thus, in *Henry* v. *United States,* 590 F2d 544 (4th Cir. 1978), the Court held that *Massiah* compelled the exclusion of statements volunteered to a Government informant who happened to be in the same cell as the defendant, and, although he had been alerted to the defendant's presence and the possibility of statements being made, "was specifically warned not to initiate conversation with or question" the defendant. 590 F2d *supra* at 544.

Applying the test recently articulated by this Court in *Rhode Island* v. *Innis,* US , 27 Cr. L. 3093 (May 12, 1980), Petitioner's words and conduct were clearly "the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response."

Nothing could be clearer than that Agent Rassey anticipated the contact between Sikora and Ajoian which ultimately ensued, and had it specifically in mind to take advantage of not only the anticipated contact but the close relationship which he knew to exist between the petitioner and the informant. The case at bar is thus even stronger

than *Henry*, because the confidence which Henry may have developed in the informant solely after the fact, through association in jail, was existing, known and counted on by the Government in the case at bar before the sequence of events which it initiated was even set in motion.

Also instructive is *Beatty* v. *United States*, 389 US 45 (1967). In that case, the Fifth Circuit Court of Appeals had affirmed the defendant's conviction as against his *Massiah* argument, on the basis that Beatty himself had suggested the meeting with the Government operative, rather than vice-versa, and had volunteered the statements which ultimately proved incriminating, needing "no encouragement" from the secret Government agent. *United States* v. *Beatty*, 377 F2d 181, 190 (5th Cir. 1967). This Court, however, granted Beatty's petition for ceriorari and summarily reversed the judgment of the Court of Appeals, on the sole and exclusive authority of *Massiah*. In the face of this authority, no argument of "voluntariness" or "waiver" on the part of the appellant here can be fairly heard.

Nothing can be clearer than that the Government created the situation which gave rise to the challenged evidence. It calls for no great jurisprudential leap of faith to contend or to hold that the Government cannot, by its own actions, deliberately bring about a situation which produces anticipated evidence, and then ingenuously claim that the evidence was the child of the situation, not of the Governmental conduct which gave birth to it.

Analogously, it has long been held that where the Government seeks to justify a warrantless search on the basis of "exigent circumstances," the exigency upon which the Government relies cannot have been created by the Government's own deliberate actions or failure to act. *See, e.g., Niro* v. *United States*, 388 F2d 535, 538 (1st Cir. 1968); *United States* v. *Scheffer*, 463 F2d 567, 574-575 (5th Cir. 1972).

In the case at bar, the Government was in sole control of the timing of the events—Agent Rassey chose to approach Sikora prior to the bringing of the indictment for reasons that were purely his—that if Sikora decided to cooperate, he would be more useful to the Government if he had not been indicted (causing the Potential subjects of his cooperation to shy away from him) than if he had. It is at least unseemly, and probably illogical as well, for the Government now to claim that actions which would otherwise have brought suppression of the challenged evidence do not now justify suppression solely because an indictment had not yet been returned—when the only reason that an indictment had not yet been returned was because of the Government's own tactical choice, and where the situation gave rise to the production of the evidence (as Rassey so clearly anticipated that it would) was the sole creation of the Government's actions.

The Government contended, and the Court of Appeals held, that the petitioner's Sixth Amendment right had not attached because adversary proceedings had not been "started against him."

However, as Judge Wiseman noted in dissent, "the Government had made a commitment to prosecute him," and "there is no doubt that plea negotiations were in progress." Judge Wiseman noted "plea bargaining is most emphatically a 'critical stage' of the prosecution, because a defendant who enters plea bargaining might well surrender the most fundamental right of all—the right to trial itself.

Judge Wiseman wrote:

> Once the government enters into plea bargaining, it is apparent that the adverse positions of the parties have solidified, and the prospective defendant is plaintly faced with the prosecutorial powers of the government. Consequently, the right to counsel should begin with the commencement of plea bargaining on those rather unusual cases where plea bargaining preceds formal charges.

Plea bargaining, even though it precedes a formal charge, should be held by this Court to meet the two-prong test set down by this Court in *United States* v. *Ash*, 413 US 300 (1973) for determining the attachment of the right to counsel: whether the accused needs aid in coping with legal problems or assistance in meeting his adversary.

The decision of the majority of the Sixth Circuit exalts form over substance, and represents an inappropriately mechanical and grudging interpretation of crucial constitutional provisions. The government's conduct in the case at bar represents exactly the same kind of evil as was condemned by this Court in *Massiah*. This Court should grant certiorari and reverse the decisions below.

II THE DECISION OF THE COURT OF APPEALS BESPEAKS A NEED FOR CLARIFICATION OF THE LAW FROM THIS COURT ON THE SCOPE OF RULE 410 OF THE FEDERAL RULES OF EVIDENCE AND ON THE MEANING OF STATEMENTS MADE IN CONNECTION WITH, OR RELEVANT TO, PLEAS OF GUILTY OR NOLO CONTENDERE, WHICH ARE EITHER OFFERED, OR MADE AND LATER WITHDRAWN.

After, and in apparent reaction to, being confronted by Special Agent Rassey in the course of his reporting to his probation officer, the appellant again spoke to Rassey later on the morning of May 24, 1978. During the course of that conversation, had in Special Agent Rassey's office, he made an admission of involvement in cocaine traffic which was introduced as telling evidence against. Agent Rassey's testimony regarding this conversation was as follows:

> Q. Did there come an occasion when you did meet with Mr. Sikora on that date May 24, 1978?
> A. Yes, he came down to my office and went in our processing room where we fingerprint and things like that, a room where we talk to people also,

and I went over again—and he was of course, a little shook up about what I had to say. He wanted to know what type of cooperation I was interested in, specifically what he would have to do. I explained to him what I wanted him to do if he decided to cooperate, that he asked me who we were interested in, who we were talking about, and at that time I told him I wasn't interested in discussing any names specifically until he had made a decision as to whether he could cooperate or not, and he said, "Well—I did say I was interested in people dealing with pound quantities," but as far as any names, I didn't mention any names, and I went on about that.

Q. What type of controlled substance, if any?

A. We were talking about cocaine.

Q. What did Mr. Sikora say, if anything?

A. After I said I was interested in people dealing pound quantities, he said, "I've got two or three people or a group of people who offer me pounds; which one do you want?" I said I'd rather not talk about who and he said, "I know who you want." Well, I said if you want to cooperate, we will talk about everything in detail.

Prior to trial, petitioner filed a motion to suppress this statement urging both involuntariness and the inadmissibility of the statement under Rule 410, Federal Rules of Evidence and Rule 11(e) (6), Federal Rules of Criminal Procedure, inasmuch as the statement was made in connection with negotiations for compromise of the then-impending criminal case. After the evidentiary hearing of September 15, 1978, the trial court denied the motion, in pertinent part as follows:

THE COURT: I think we have to look at the exact language in Rule 410.

Rule 410 says, "except otherwise provided by an act of Congress," and Congress actually enacted these laws themselves and there are no other exceptions in this case, evidence of a guilty plea, a plea of guilty—whether withdrawn, that's not the case here or a plea of nolo contendere; that's not the case here.

A crime charged or any other crime after a crime is charged or any other crime or statements made in connection with any of the foregoing pleas or offers, and if this can fall under anything, it is under the statement of any of the foregoing pleas or offers.

I don't find there was any plea; I don't find there was any guilty of any plea of nolo contendere, nor do I find there was any offer to plea guilty or to plead nolo contendere having known there was no offer to plead guity or an offer to plead nolo contendere. I find the reknown statement made in connection in it foregone pleas or offers. (sic)

This Rule is rather carefully drawn. It is drawn with the idea of attempting to protect people who are in real negotiations as rather to plead wuity or not. It involves an offer on the part of one of the parties to plead guilty or plead nolo contendere.

* * *

> This is not—there is nothing in this Rule that says language in connection with "plea bargaining" should not be received. The language in this Rule says anything that is a statement made in connection with an offer to plead guilty or an offer to plead nolo contendere, or a plea of guilty should not be received.
>
> * * *

The majority opinion in the Sixth Circuit tracked this analysis.

The procedural setting of the case at bar is one which seems to fairly cry out for the invocation of the rule of exclusion set forth by Rule 410, for the very heart of the matter is that the discussions were initiated by the Government, with the specific intent of working out a *quid pro quo* for the disposition of imminent and impending criminal charges.

This last point is what distinguished the case at bar from the decision of the Second Circuit Court of Appeals in *United States* v. *Levy*, 578 F2d 896 (2nd Cir. 1978), relied upon by the trial court in denying the motion to exclude the statements, because, as the court there noted as decisionally determinative, Levy "made his offers of cooperation and attendant admissions without attaching any condition to his admissions. *The agents did not initiate the discussion.*" 578 F2d *supra* at 901 (emphasis supplied). "Rather," the court wrote "he volunteered to cooperate in the absence of any request from the agents." *Ibid.* Such a situation is the precise antithesis of that posed by the case at bar, where the entire process was initiated by Government action and the admission ultimately relied upon was one made as an inquiry expressly designed to determine what the Government was asking for.

The fact that the government had initiated the process through Assisant United States Attorney Andreoff here is of utmost significance. Agent Rassey of the DEA testified at

the evidentiary hearing that he and Andreoff had discussed their feeling that Sikora might be interested in cooperating and that it would be in the interests of both Sikora and the government for him to decide to cooperate before he was formally indicted. This testimony clearly demonstrated the initiation by the government of plea bargaining, since the only logical offer the government could make in return for Sikora's cooperation would have been a plea to reduced charges, or else a decision to not press charges against Sikora at all. Rassey obviously did not meet with Sikora in an investigative stance, since he stated that he met with him in order to " . . . inform him of his situation . . . ", to get Sikora to " . . . think about it and make a decision." This attitude is clearly reflective of an attempt to negotiate with Sikora and to gain his cooperation, especially in light of the fact that Rassey felt that Miranda warnings were not necessary during their discussions at the two meetings.

The reading of the rule adopted by the courts below would place an impermissible burden on a prospective defendant who agrees to enter into negotiations with the government. Faced with the possibility of having statements made during the course of plea negotiations used against him in subsequent criminal proceedings not only undercuts the purpose of the rule to promote open and frank discussions between the parties, it is also repugnant to the intent of the Rule to afford protection to the prospective defendant who chooses to enter into negotiations with the government. The factual record here is illustrative of this point. Had Sikora chosen not to cooperate he would have risked facing criminal charges brought by the United States Attorney's office. On the other hand, he could choose to cooperate and enter into plea negotiations with the government, where, under the trial court's reading of Rule 410, any statements made by him could be used against him.

The fact that the specific conversation was initiated by the defendant, rather than the Agent, does not in any way undercut this argument, since not only was the defendant's

reaction a reasonably foreseeable one, but, in any event, Rassey had asked him to get back to him as to his decision once he had considered the question. To the effect that the mere fact that a particular discussion is initiated by the defendant does not affect the character of the discussion for purposes of the question of admissibility as a part of "plea negotiations," see, *United States* v. *Smith*, 525 F2d 1017 (10th Cir. 1975).

The courts below gave too narrow and restrictive a reading to the rule. (Actually, recourse to the rule is not necessary, since the exclusion of statements made in the course of plea negotiations is a principle of the federal criminal jurisprudence that predates the enactment of the rule. *United States* v. *Smith, supra*). No specific plea, or offer to plead, need be shown. The sense of the rule is that attempts to compromise criminal cases, pending or impending, should be encouraged, and frank and open discussions regarding such compromises should likewise be encouraged—a result only possible by insulating those discussions from subsequent evidentiary use.

The rule was certainly not designed to cover attempts to gain confessions through hopes of leniency—but this is certainly not what was involved in the case at bar. Rather, what was involved was a specific, purposeful attempt to resolve an imminent criminal case through negotiations with the defendant. Special Agent Rassey apprised the petitioner of his perilous legal position, and of the possibility that some reduction in the severity of the consequences of that position might be had through the petitioner cooperation. It was not an attempt to get admissions from the petitioner, or evidence regarding the petitioner's own culpability, but rather, to arrive at a negotiated resolution of the impending prosecution. The challenged statements, moreover, are precisely the sort of statements which, rather than being intrinsically admissions of guilt, are intrinsically part of negotiating for compromise—an attempt to determine what it is that the Government wants.

In what appears to be the most exhaustive recent analysis of the scope of the rule of exclusion mandated by Rule 410, the *en banc* Fifth Circuit Court of Appeals, in *United States* v. *Robertson*, 582 F2d 1356, 1365-1366 (5th Cir. 1978) noted that the heart of the functional definition of what constitutes "plea negotiation" is the concept of "a bargaining process, a 'mutuality of advantage' . . . and a mutuality of disadvantage. That is, the government and the accused both seek a concession for a concession, a *quid pro quo*." (Citations omitted). Such negotiations are, of course, to be distinguished from situations in which the accused is "merely making an admission." 582 F2d *supra* at 1367.

In the case at bar, nothing could be clearer than that not only was it negotiation which was in the minds of both the Agent and the petitioner, but that it was the currency of those negotiations which was the very subject matter of the challenged statements.

The courts below made much of the fact that no "plea" was specifically offered, accepted, or discussed. In the *quid pro quo* of plea negotiations, the plea may be considered the *"quo."* That the *"quo"* was not discussed is certainly of some significance in analyzing the totality of the situation, which a court may appropriately do. However, of at least equal significance, and apparently overlooked by the trial court, is the fact that, if it was not the *"quo"* which the defendant brought into the conversation, then certainly it was the *"quid"*—that is, what the Government wanted in return for the consideration which it would show, the "disadvantage" which it would expect from the defendant, or the "advantage" which it would expect for itself. The trial court's interpretation and application of the rule was simply too literal, and failed to recognize the sense of the situation which the undisputed evidence presented.

Nor is it significant that it was the avoidance of prosecution, or dismissal (or abandonment) of charges which was specifically discussed—dismissals, or agreements not to prosecute, are often the currency of "plea" negotiations. See, *e.g.* Rule 11(e)(1)(A), Federal Rules of Criminal Procedure.

Also militating in favor of a finding that the discussions occurred as part of the negotiation, rather than the investigative process, is the fact that the discussions were preceded by a conference with the prosecuting attorney. Instructive in this regard is *United States* v. *Ross*, 493 F2d 771 (5th Cir. 1974), in which the subject of a plea was not even discussed—rather, the defendant agreed to make a statement taking the blame for everything if his wife would be released. Wrote the court: "We have no doubt that Ross' discussion with the agent, especially since the prosecutor had already been consulted, must be classified as an effort to bargain a plea." 493 F2d *supra* at 775.

A potential forerunner to any offer by a prospective defendant in a criminal case to enter a plea is negotiation between the parties to the case.

The Court of Appeal's restrictive reading of Rule 410 undercuts the intent of the rule to promote frank and open discussions during these negotiations between the parties to a criminal case. In contrast, the Fifth Circuit's statement in *Robertson* that the basis of plea negotiation is "a bargaining process" reflects a recognition by that circuit that both parties are seeking concessions and offering compromises.

Beyond these basic philosophical conflicts, the decision of the Sixth Circuit is in clear conflict with *United States* v. *Grant*, F2d , 27 Crim. Law Rpte. 2190 (8th Cir. 1980). In *Grant*, the Eighth Circuit held that incriminating statements made during an interview in which a plea offer had been forwarded by an FBI agent should have been suppressed under Rule 410, although it was not clear whether the statements preceded or followed the plea offer.

As in *Grant*, the agent in this case was specifically authorized by the United States Attorney to open negotiations with the petitioner, and the logic of *Grant* would compel suppression of the statements even though no specific order was made in the instant case. As Judge Wiseman noted in dissent, below, "plea bargaining is still plea bargaining even though the government has not

decided on its specific offer. To decide otherwise would allow the government to circumvent Rule 410 by the simple device of being vague."

In addition to being in conflict with the authorities in other circuits, and the purpose underlying Rule 410, the decision below is simply unfair and unwise as a matter of criminal law policy. As Judge Wiseman wrote, dissenting below:

> The government's conduct of telling a prospective defendant that it wants to discuss "cooperation" with him (i.e., plea bargaining in return for information) and then using the defendant's part of the discussion against him is totally repugnant, as the drafters of Rule 410 realized. Indeed, this conduct is so fundamentally unfair that it probably constitutes a violation of Fifth Amendment substantive due process. The government placed Sikora in a position where he could either talk about cooperation and risk having his statements used against him, or he could refuse to talk and risk facing the full wrath of the United States Attorney's office. Although Sikora's statements were, in a strict sense, voluntary, it is shameful for the government to penalize an individual for statements made in a good faith attempt to respond to overtures initiated by the government.

This Court should grant the Petition for Certiorari and reverse the decisions below.

CONCLUSION

It is therefore respectfully submitted that this Court should grant the Petition for Writ of Certiorari to review the substantial questions herein posed.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 79-5189

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)
vs.	)
GLENN L. SIKORA, *Defendant-Appellant.*	)

ORDER

Before: EDWARDS, Chief Judge and WISEMAN,* District Judge.

On receipt and consideration of an appeal in the above-styled case and after consideration of the briefs, record and oral arguments; and

Finding from this record no legal or constitutional basis for appellant's contention that certain incriminating physical and oral evidence should have been suppressed, since appellant at the times concerned was neither in custody *(see Escobedo* v. *Illinois,* 378 U.S. 478 (1964), nor had adversary proceedings been started against him *(see Massiah* v. *United States,* 377 U.S. 201 (1964), and *Brewer* v. *Williams,* 430 U.S. 387 (1977)); and

Further finding no abuse of discretion in the District Judge's admission of an otherwise admissible tape recording on the grounds that portions thereof were inaudible; and

Further finding no violation of Rule 11(e)(6) of the Federal Rules of Criminal Procedure, there having been no plea of guilty tendered by appellant, no proposal of such a plea made by the United States, and no proposal to negotiate such a plea made by appellant Sikora; and

* Honorable Thomas A. Wiseman, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

Further finding, if the comments made by appellant could be construed as plea negotiations, that the admission of these comments in this trial could be nothing other than harmless error when considered against the totality of the clearly admissible evidence.

Now, therefore, the judgment of conviction is hereby affirmed.

Entered by order of the Court

(s) JOHN A. HEHMAN
Clerk

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	
v.	)	NO. 79-51
GLENN L. SIKORA, *Defendant-Appellant.*	)	

JUDGE WISEMAN, CONCURRING IN PART AND DISSENTING IN PART

I respectfully dissent. I would hold that: (1) Rule 410, F.R. Evid., and its counterpart, F.R. Crim. P. 11 (e)(6), bar the government's use of Sikora's statements to Agent Rassey on May 24, 1978; and (2) *Massiah* v. *United States,* 377 U.S. 201, 12 L.Ed.2d 246, 84 S.Ct. 1199 (1964), requires the suppression of the physical evidence obtained by the secret agent Ajoian shortly after May 24, as well as Sikora's incriminating statements elicited and recorded by Ajoian on June 14, 1978. Because the admission of the evidence obtained by Ajoian was harmless beyond a reasonable doubt in regard to Counts Thirteen through Sixteen of the sixteen-count indictment, I would affirm Sikora's convictions on those counts. The error was not harmless in regard to the first twelve counts, however, and Sikora's convictions on those charges should be reversed and remanded.

Order

I.

On July 25, 1978, a federal grand jury in Detroit returned a sixteen-count indictment against the appellant, Glenn Sikora. Eight counts alleged possession with intent to distribute cocaine, while the remaining eight counts alleged the actual distribution of this controlled substance, all in violation of 21 U.S.C. § 841(a)(1). Sikora was convicted of all counts in a bench trial before the Honorable Julian Cook, and was sentenced to eight eight-year terms, to be served concurrently.

For the purposes of this appeal, Sikora's legal problems began on May 24, 1978, when Agent Rassey of the DEA arranged a surprise visit with Sikora in the office of his federal probation officer. (Sikora was on probation for a previous cocaine-related conviction). Rassey's meeting with Sikora had earlier been authorized by Assistant United States Attorney Andreoff at a meeting with Rassey, during which they had discussed the desirability of obtaining Sikora's cooperation with the DEA. (App. 72-73). Agent Rassey, who had been investigating Sikora for some time, informed him that in his opinion, "we had enough evidence to indict and convict him (App. 74)," and that "it would be in his best interest" to cooperate with the DEA. Otherwise, "the chance of him receiving a severe sentence was very possible." (App. 74). At his meeting with Sikora, Rassey, after suggesting to Sikora that it would be in his best interest to cooperate, advised Sikora that he should consult with an attorney. He then told Sikora to take a week to think about cooperation. (App. 77). At this time, Sikora had neither been arrested nor indicted on any charges.

Instead of waiting a week, Sikora, visibly distressed by what Rassey had told him (App. 79-80), went downstairs to Rassey's office after concluding his interview with Probation Officer Briscoe. Sikora wanted to know what type of cooperation the government wanted, and what he would have to do. (App. 79-80). Rassey indicated that he was interested in people dealing in pounds of cocaine, to

which Sikora responded, "I've got two or three people or a group of people who offer me pounds; which one do you want?" (App. 80). Rassey stated that he did not want to discuss any names until he was assured of Sikora's cooperation, to which Sikora replied, "I know who you want." Sikora unsuccessfully moved to suppress these statements prior to trial, and he now appeals the lower court's decision to admit these incriminating statements.

After the second meeting with Sikora, Rassey called Edward Ajoian, a long-time friend of Sikora's, who was now cooperating with the DEA in its investigation of the appellant. Ajoian had begun cooperating with the DEA after his own arrest on drug charges in November 1977, and he had already participated in two government-supervised "controlled buys" of cocaine from Sikora. Rassey told Ajoian about his confrontation with Sikora, and asked Ajoian to let him know "if anything happened or if Mr. Sikora said anything." (App. 88). Shortly thereafter, Ajoian had a telephone conversation with Sikora, although it is unclear which of the two placed the call. (App. 99). Sikora told him about his meeting with Rassey, and stated that he wanted to get rid of some scales and other narcotics paraphernalia. At some point over the long Memorial Day weekend following May 24, Ajoian went to Sikora's home and picked up a duffel bag containing the scales. Within "a couple of days," Ajoian called Rassey to tell him about the scales and Rassey later paid Ajoian $150 for them.

On June 14, Ajoian went back to Sikora's home to tell him that he had disposed of the scales. Ajoian was "wired" with a body transmitter, and it successfully recorded Sikora's numerous incriminating statements. Sikora moved to suppress both the scales and recorded statements, but that motion was also denied, thereby giving rise to the second issue addressed below.

Prior to June 14, Sikora's attorney, Mr. LaRene, had engaged in discussions with Assistant United States Attorney Andreoff and Agent Rassey about the terms of

Sikora's possible cooperation. Sikora ultimately decided not to cooperate, but it is clear that negotiations were still in progress on June 14, the date Ajoian elicited the recorded statements at issue. (App. 91-92).

II.

F.R. Evid. 410 provides that statements made in connection with and relevant to an offer to plead guilty to any crime are not admissible against the person who made them. In the instant case, it is clear that on May 24, the government offered Sikora a plea to reduced charges (or perhaps, no charges at all) in return for his cooperation in netting bigger cocaine dealers. The crucial finding in this case is that the government, through Assistant United States Attorney Andreoff, had initiated the plea bargaining process prior to May 24. At the evidentiary hearing (App. 71-74), Agent Rassey, under direct examination by Andreoff, told of a pre-May 24 meeting in which Andreoff and Rassey discussed their feeling that Sikora

> was in a position which (sic) he might be interested in cooperation, that if he did cooperate—that if there had been a lot of cooperation that would be valuable to the DEA, and that if he decided to cooperate it would be in his interest and the government's interest for him to decide that before he was formally indicted.

(App. 72-73)

Although this conversation was couched in terms of "cooperation" and apparently did not deal with specific plea proposals, it is clear that Andreoff and Agent Rassey were discussing the initial stages of plea bargaining with Sikora. Surely they did not expect to obtain Sikora's cooperation in return for nothing, and the only thing the government could offer, so far as the record discloses, was a plea to reduced charges (or possibly no charges at all). There is also no doubt that Andreoff authorized Agent

Rassey to make the initial overtures to Sikora at the May 24 meeting; as Rassey testified, "[a]fter discussing [it] with you, it was decided that I should meet with Sikora." (App. 71).

The government has argued that Rassey was engaged in "investigation" rather than plea bargaining when he met with Sikora in Probation Officer Briscoe's office, Brief for Appellee 24, but the testimony of Rassey shows beyond any serious doubt that he was engaged in the early stages of negotiation. If Rassey was in fact investigating Sikora on May 24, it is difficult to understand his confidence that Miranda warnings were not necessary during their two meetings on that date. (See App. 75-76; 80-81). To quote Rassey again, "I didn't want to ask him any questions, I just wanted to inform him of his situation, and I wanted him to think about it and make a decision." (App. 76). This is not the essence of investigation; it is, rather, the beginning of plea negotiations, at least in the case when an Assistant United States Attorney has expressly authorized a law enforcement agent to initiate the plea bargaining process. *See United States* v. *Grant*, No. 79-1483, 27 Crim. L. Rep. 2190 (8th Cir. April 29, 1980). Because this is the situation presented in the instant case, I am convinced that plea bargaining began when Agent Rassey first met with Sikora in Probation Officer Briscoe's office on the morning of May 24.

The incriminating statements at issue were not made until Sikora went down to talk with Agent Rassey approximately one-half hour after their first meeting. (App. 79). The government attributes great significance to the fact that Sikora initiated the second meeting, Brief for Appellee 24, but that fact in no way supports the government's position, because it is clear that Sikora set up this second meeting so he could discuss the offer that Rassey had presented to him. Rassey, of course, intended that Sikora discuss the possibility of "cooperation" with him, although he had suggested that Sikora "could have a week." (App. 77).

The government's conduct of telling a prospective defendant that it wants to discuss "cooperation" with him (i.e., plea bargaining in return for information) and then using the defendant's part of the discussion against him is totally repugnant, as the drafters of Rule 410 realized. Indeed, this conduct is so fundamentally unfair that it probably constitutes a violation of Fifth Amendment substantive due process. The government placed Sikora in a position where he could either talk about cooperation and risk having his statements used against him, or he could refuse to talk and risk facing the full wrath of the United States Attorney's office. Although Sikora's statements were, in a strict sense, voluntary, it is shameful for the government to penalize an individual for statements made in a good faith attempt to respond to overtures initiated by the government. *See United States* v. *Ross*, 493 F.2d 771, 775 (5th Cir. 1974). It is not necessary to hold that the Fifth Amendment requires the suppression of Sikora's statements, however, because Rule 410 is clear enough.

This Circuit has held that even statements made in "an attempt to open plea bargaining" are inadmissible. *United States* v. *Brooks*, 536 F.2d 1137, 1139 (6th Cir. 1976) (Edwards, J.). In *Brooks*, the defendant in a mail theft case telephoned the postal inspector in charge of the investigation and offered to plead guilty if he were given a maximum sentence of two years. This Court held that the inspector's testimony about this telephone call was inadmissible, citing F.R. Crim. P. 11(e)(6) as persuasive authority, although it was not in effect at the time of trial. *Brooks* requires the suppression of Sikora's statements to Rassey, because they were made in response to the government's opening of plea bargaining. Sikora's statements were not part of a definite offer to plead, unlike those of the *Brooks* defendant, but that distinction is immaterial because Sikora's statements were in response to plea bargaining overtures initiated by the government. Requiring a defendant to show a definite intent to plead

guilty in order to be protected by Rule 410 may be a sensible requirement when a defendant is seeking to suppress statements made in a discussion *initiated by him*, but that is not what occurred in the instant case. *See United States* v. *Geders*, 585 F.2d 1303 (5th Cir. 1978). This is a case in which the government proposed an offer to the defendant (though not in final form), and consequently any statements made by Sikora while discussing the proposal are inadmissible because they are "made in connection with and relevant to . . . an offer to plead guilty." There is no reason why the government cannot be the party making the "offer" contemplated by the Rule, as the Eighth Circuit recognized in the recent case of *United States* v. *Grant*, *supra* (FBI agent extended offer to plead during pre-indictment interview).

Because the statements in *Brooks* were made to a law enforcement officer who had no authority to negotiate a plea agreement, *Brooks* has been criticized as extending the coverage of Rule 410 too far, and it has served as an impetus for amending Rule 410 so that only statements to prosecuting attorneys are covered. Act of July 31, 1979, Pub. L. No. 96-42, 93 Stat. 326; *see* Advisory Committee Notes to Proposed Amendments to Rule 410, reprinted in 2 J. Weinstein, Evidence 132-36 (Supp. 1979). In the instant case, however, Sikora was rationally responding to an offer made by a government agent who was empowered by an Assistant United States Attorney to begin plea negotiations; therefore, even if the Sixth Circuit were to retreat from the *Brooks* holding in light of the proposed amendment to Rule 410, that step would not benefit the government in this case. *See Grant, supra.*

The case law cited by both parties is not particularly helpful, because none of the cases cited present situations in which the evidence clearly shows that the government had initiated plea bargaining when the defendants made the incriminating statements at issue. Consequently, the primary issue in these cases is whether the defendant had

initiated plea bargaining, or whether the statements were simply admissions made during the investigation. Rule 410 was not intended to exclude statements made to law enforcement officers during the investigatory stage of a criminal case, *see* Advisory Committee Notes to Proposed Amendments to Rule 410, *supra*, and defendants should not be permitted to retroactively convert genuine admissions into offers to plead. *See* 2 Weinstein, *supra*, ¶ 410[07] (main text). However, that danger is not present in the instant case, because the record clearly shows that the *government* started the plea bargaining process, and Sikora was merely responding to the government's overtures when he made the incriminating statements at issue. Consequently, this case does not present the potential for abuse feared by Weinstein and the Advisory Committee, because the objective facts, as disclosed by the government's own witness, Rassey, disclose that plea bargaining was indeed in progress.

The case most on point is a recent Eighth Circuit decision, *United States* v. *Grant*, *supra*. In Grant, an FBI agent requested an interview with Grant, a county judge, in regard to a kickback scheme that was the target of government investigators. Grant, who had neither been arrested nor indicted, agreed to the meeting, and made several incriminating statements. At some point during the interview, the FBI agent offered Grant a plea to a one-count indictment in return for his cooperation. The United States Attorney had previously authorized the agent to make this offer, although it was a rather unusual procedure. Grant neither accepted nor rejected the offer, but responded that he wanted to explore the plea bargain with the United States Attorney.

The court held that the statements made during this interview were inadmissible under Rule 410, even though it was unclear whether the incriminating statements preceded or followed the plea offer. Judge Hunter was careful to explain that, ordinarily, incriminating statements to FBI

agents could not be a part of plea bargaining, but he carved out an exception for those relatively rare cases when the agent is acting with express authority from a government attorney. Because the FBI agent in *Grant* was acting under the United States Attorney's authority when he made the plea offer, the statements made by Grant in response were inadmissible.

The reasoning of the Eighth Circuit is most persuasive, and should be applied to this case. The only significant factual distinction between the two cases is that the FBI agent in *Grant* was authorized to make a definite offer, while Agent Rassey was only authorized to commence negotiations. This is a distinction without a difference, however, because plea bargaining is still plea bargaining even though the government has not decided on its specific offer. To decide otherwise would allow the government to circumvent Rule 410 by the simple device of being vague. I am persuaded by the Eighth Circuit's analysis in *Grant*, and I believe its application to the instant case leads to the conclusion that Sikora's May 24 statements to Rassey should be suppressed.[1]

III.

I also dissent from the panel's holding that evidence of the June 14 conversation between Sikora and the informar Ajoian was admissible, as well as its holding that the scales obtained by Ajoian at some point during the long weekend of May 25-27 were admissible. Although the majority has

[1] This error was not of constitutional magnitude, and thus the standard of *Chapman* v. *California*, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967), is inapplicable. The error would be reversible only if, in context, it had a substantial impact on the decision of the fact finder. *See United States* v. *Archbold-Newball*, 554 F.2d 665, 680 (5th Cir.), *cert denied sub nom Romirez-Betancourt* v. *United States*, 434 U.S. 1000, 54 L.Ed.2d 496, 98 S.Ct. §44 (1977). I cannot conclude that Sikora's statements to Rassey had such an impact, particularly since the case was tried to the district judge, and therefore I would not hold that the admission of these statements was reversible error.

concluded that Sikora's Sixth Amendment right to counsel had not attached as of June 14, it is my opinion that the right to counsel attached when plea negotiations began on May 24, the date when Agent Rassey approached Sikora with the initial overtures of plea negotiations.[2] Moreover, even if the majority rejects the proposition that plea negotiations began on May 24, there is no doubt that plea negotiations were in progress on June 14, the date on which Ajoian, the government's "wired" secret agent, elicited the incriminating statements at issue from Sikora. (App. 84-85; 91-92).

Once it is established that Sikora's Sixth Amendment rights came into effect prior to June 14, *Massiah* v. *United States*, 377 U.S. 201, 12 L.Ed. 2d 246, 84 S.Ct. 1199 (1964), forbids the government's use at trial of the statements elicited from Sikora. Massiah's operative facts are virtually identical to those of the instant case; in both cases, confederates of the defendant became government agents and elicited incriminating statements from their former friends. The government insists that *Massiah* is not controlling, because, unlike *Massiah*, Sikora had not been arrested or indicted, and thus he was not protected by the Sixth Amendment. That argument should be rejected, however, because the commencement of plea negotiations triggered Sikora's Sixth Amendment rights in the same manner, and for the same reasons, that arrest or indictment would have.

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[2] *Massiah* prohibits the government from "deliberately eliciting" incriminating information from a suspect after his Sixth Amendment rights have attached. *See Rhode Island* v. *Innis*, 48 U.S.L.W. 4506, 4508 n.4 (May 12, 1980). Consequently Sikora's May 24 statements were not obtained in violation of *Massiah*, because even though Sikora's Sixth Amendment rights attached when Rassey first approached him, Agent Rassey was not attempting to elicit information from Sikora when Sikora made his self-initiated visit to the DEA office. As I have tried to demonstrate in Part II, *supra*, Rassey was negotiating with Sikora on May 24, and not deliberately attempting to elicit incriminating statements. (*See* App. 76). Ajoian, on the other hand, was deliberately eliciting incriminating statements from Sikora on June 14, and thus the *Massiah* prohibition applies.

There should be no cause for alarm at the prospect of potential criminal defendants enjoying Sixth Amendment rights during plea negotiations. As a practical matter, it may be assumed that virtually all persons who enter into plea negotiations with the government are protected by counsel, because in most cases judicial proceedings would have begun before plea negotiations commence, and therefore the right to counsel would have already attached. As the Supreme Court stated in *Brewer* v. *Williams*, 430 U.S. 387, 51 L.Ed.2d 424, 97 S.Ct. 1232 (1977), the right to counsel means "*at least* that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' " 430 U.S. at 398 (emphasis added), *quoting Kirby* v. *Illinois*, 406 U.S. 682, 689, 32 L. Ed. 2d 411, 92 S Ct. 1877 (1972).

This case presents a variation on the normal course of criminal proceedings, because plea negotiations between the United States Attorney's office and the defendant began even before Sikora had been formally charged. The government cites *Kirby* and *Brewer* in support of its argument that no right to counsel attaches until the beginning of adversary judicial proceedings, a point which the government identifies as the time of arrest. *See* Brief for Appellee 18. In the majority of cases, the arrest does in fact mark the beginning of adversary proceedings, and is not "a mere formalism," *Kirby* v. *Illinois*, 406 U.S. at 689, that provides the triggering mechanism for Sixth Amendment rights. However, it is important to note that the *Kirby* plurality[3] identified the initiation of judicial proceedings as the point when the government has committed itself to

[3] The *Kirby* plurality opinion can be considered as a holding that the right to counsel attaches *no later than* the initiation of judicial proceedings such as a formal charge, because the dissenters (Justices Brennan, Marshall, and Douglas) would have attached the right to counsel at an even earlier stage.

prosecute, and the adverse positions of the parties have solidified. "It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Id.* If in fact the adverse positions of the parties have solidified at some point earlier than arrest and the defendant has been "faced with the prosecutorial forces" of the government, *Kirby* clearly suggests that the right to counsel attaches at that point, despite the absence of "formal" procedures.[4]

In the instant case, Sikora's right to counsel was in effect on June 14, because it is obvious that prior to that date, the government had made a commitment to prosecute him. This finding is based on the fact that the government had entered into plea negotiations with Sikora, the government's agent being Assistant United States Attorney Andreoff. (App. 91-92). Once the government enters into plea bargaining, it is apparent that the adverse positions of the parties have solidified, and the prospective defendant is plainly faced with the prosecutorial powers of the government. Consequently, the right to counsel should begin with the commencement of plea bargaining in those rather unusual cases where plea bargaining precedes formal charges.

Plea bargaining is most emphatically a "critical stage" of the prosecution, because a defendant who enters plea bargaining might well surrender the most fundamental right of all—the right to trial itself. *See Coleman* v. *Alabama*, 399 U.S. 1, 26 L. Ed. 2d 387, 90 S. Ct. 1999 (1970). The accused "requires the guiding hand of counsel," *Powell* v. *Alabama*, 287 U.S. 45, 69, 77 L. Ed. 158, 43 S. Ct. 55 (1932), to ensure that he does not lightly surrender that

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[4] Because plea bargaining is now regulated by Rule 11, F.R. Crim. P., which gives the district judge ultimate supervision over plea bargains, I think a strong argument can be made for the proposition that plea bargaining is itself a judicial proceeding in the sense contemplated by *Kirby*.

most basic protection of the Anglo-American system of justice. In *United States* v. *Ash*, 413 U.S. 300, 313, 37 L.Ed.2d 619, 93 S.Ct. 2568 (1973), Justice Blackmun wrote for a majority of the court that the test for the attachment of the right to counsel requires a determination of whether the accused needs aid in coping with legal problems or assistance in meeting his adversary. Plea bargaining situations easily satisfy both prongs of this two-part test. The accused might well be ignorant of defenses against the contemplated charges, and as the Court stated in *Hamilton* v. *Alabama*, 368 U.S. 52, 55, 7 L.Ed.2d 114, 82 S.Ct. 157 (1961), "[o]nly the presence of counsel [enables the] accused to know all the defenses available to him and to plead intelligently." The layman's peril is magnified because the government is represented by "experienced and learned counsel," *Johnson* v. *Zerbst*, 304 U.S. 458, 462-63, 82 L.Ed. 1461, 58 S.Ct. 1019 (1938), whose plea negotiating skills may so far surpass those of the defendant's that overreaching, intentional or otherwise, is a distinct possibility. Consequently, the lay defendant should not be expected to undergo the plea bargaining process alone, because the same dangers that require counsel at other stages apply just as forcefully in the plea bargaining context.[5]

The Court recognized that the right to counsel has evolved to reflect changing patterns of criminal procedure. 413 U.S. at 310. The Court has extended the right in new

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[5] The potential prejudice is not remedied by offering the assistance of counsel to the defendant when he appears before the court to make his guilty plea. By that time, the government may have so strengthened its case through information obtained during plea negotiations that a change of plea would be unwise, regardless of how inadvisable the plea bargain was. In order to protect his rights and ensure that the defendant does not, for example, plead to an offense of which he may be innocent, counsel is required from the outset of plea negotiations. Any system that would usher in counsel at the last minute and present him or her with a fait accompli substantially negotiated by the defendant makes a mockery of the right to counsel articulated in F.R. Crim. P. 11(c)(2), as well as the Sixth Amendment right to counsel.

contexts that present the same dangers that gave rise to the right originally, those dangers being confrontation with the procedural system, the expert prosecutor, or both. In the plea bargaining context, the accused is presented with both of these dangers, and therefore those persons who enter the plea bargaining process before formal charges have been filed should have the protection of the Sixth Amendment.

It should be emphasized again that this is not a major or even a particularly significant extension of Sixth Amendment protection, because in most cases formal proceedings would have begun before plea bargaining commences. However, when the government begins plea negotiations with a citizen who has not been formally charged, he is just as surely faced with the "prosecutorial forces of organized society" as the defendant who has been formally introduced into the system. For this reason, I conclude that Sikora's right to counsel had attached prior to June 14, the date when the government's agent, Ajoian, successfully elicited incriminating statements from him. For that reason, Sikora's June 14 statements should have been suppressed.[6]

I would further hold that the scales obtained by Ajoian sometime during the Memorial Day weekend of May 25-27, 1978, should also have been suppressed. This conclusion is based on the finding that Sikora's right to counsel attached on Friday, May 24, the date when Agent Rassey approached Sikora to discuss the possibility of "cooperation." *Massiah* prohibits the government from deliberately eliciting "incriminating information" from a

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[6] *Massiah* prohibits government agents from "deliberately eliciting" incriminating information from a defendant in the absence of counsel once the right to counsel has attached. I have consistently referred to Ajoian's June 14 efforts as the eliciting of information rather than interrogation, because the recent case of *Rhode Island* v. *Innis*, 48 U.S.L.W. 4506 (May 12, 1980), to the extent that it might be applicable, casts some doubt on whether Ajoian was engaged in an interrogation of Sikora. *CF.* 48 U.S.L.W. at 4508 n.4 (suggesting that the term "interrogation" might not be "apt" in the Sixth Amendment context).

defendant after the attachment of the right to counsel. *See Rhode Island* v. *Innis*, 48 U.S.L.W. 4506, 4508 n.4. The record shows that Ajoian was actively engaged in his ongoing efforts to elicit incriminating information from Sikora at the time he obtained the scales. (App. 87-88; 99-102). Because the physical evidence at issue was the fruit of Ajoian's elicitation of incriminating information from Sikora after Sikora's right to counsel had attached. *Massiah* requires its suppression.

IV.

Without the evidence that I conclude should have been suppressed, only the stipulated testimony of Ajoian supported Sikora's conviction on Counts One through Twelve of the sixteen-count indictment. Ajoian was under intense pressure to cooperate with the government (App. 105-08), and his credibility is subject to serious question. Consequently, I conclude that the admission of the tainted evidence was not harmless beyond a reasonable doubt in regard to the first twelve counts, because it supplied corroboration to the testimony of Ajoian.[7] I would therefore reverse and remand Sikora's convictions on those counts.

The last four counts were based on government-supervised "controlled buys" by Ajoian from Sikora, and the testimony of Agent Rassey in regard to those buys is most damaging, far more damaging than any of the evidence I would exclude. Consequently, as to Counts Thirteen through Sixteen, I am persuaded that the admission of the tainted evidence was harmless error beyond a reasonable doubt, and the convictions on those counts should be affirmed.

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[7] This conclusion is based on the admission of the June 14 tapes alone. In other words, even if the scales were admissible (e.g., because the right to counsel had not attached on May 24), I would conclude that the recorded conversations were sufficiently prejudicial to overcome a finding of harmless error.